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14. ABSTRACT Commanders need to understand how the law of armed conflict applies to the various enemy forces they are likely to encounter while combating terrorism. Historically, terrorists have been regarded as bandits and held criminally responsible for their unlawful acts under domestic law. However, after the attacks on the World Trade Center and Pentagon in September 2001, the U.S. decided to engage transnational terrorists in armed conflict. As enemy combatants, terrorists may be lawfully killed by virtue of their membership in the enemy group rather than their individual conduct. If a nation's armed forces harbor or support terrorists, the facts will determine whether they are lawful or unlawful combatants. Lawful combatants are protected under the Geneva Convention Relative to the Treatment of Prisoners of War and entitled to specific privileges while captured. Unlawful combatants have no such rights. The President has considerable latitude in identifying, detaining, and punishing them. As U.S. forces engage terrorists and the states that harbor them, we should expect to encounter both lawful and unlawful combatants. This paper explains what the difference is and why it matters.					
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**TERRORISTS AS ENEMY COMBATANTS**  
**An Analysis of How the United States Applies the Law of Armed Conflict**  
**in the Global War on Terrorism**

By

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A paper submitted to the Faculty of the Naval War College in partial satisfaction of the requirements of the Department of Joint Maritime Operations.

The contents of this paper reflect my own personal views and are not necessarily endorsed by the Naval War College or the Department of the Navy.

Signature: \_\_\_\_\_

9 February 2004

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## **Abstract**

### **TERRORISTS AS ENEMY COMBATANTS**

#### **An Analysis of How the United States Applies the Law of Armed Conflict in the Global War on Terrorism**

Commanders need to understand how the law of armed conflict applies to the various enemy forces they are likely to encounter while combating terrorism. Historically, terrorists have been regarded as bandits and held criminally responsible for their unlawful acts under domestic law. However, after the attacks on the World Trade Center and Pentagon in September 2001, the U.S. decided to engage transnational terrorists in armed conflict. As enemy combatants, terrorists may be lawfully killed by virtue of their membership in the enemy group rather than their individual conduct.

If a nation's armed forces harbor or support terrorists, the facts will determine whether they are lawful or unlawful combatants. Lawful combatants are protected under the Geneva Convention Relative to the Treatment of Prisoners of War and entitled to specific privileges while captured. Unlawful combatants have no such rights. The President has considerable latitude in identifying, detaining, and punishing them.

As U.S. forces engage terrorists and the states that harbor them, we should expect to encounter both lawful and unlawful combatants. This paper explains what the difference is and why it matters.

## INTRODUCTION

The recent activities of transnational<sup>1</sup> terrorist organizations have transcended the realm of mere criminality. For more than a decade, the Al Qaeda terror network has repeatedly attacked U.S. citizens, property, and military interests, to wit: the World Trade Center in 1993, the U.S. Embassies in Kenya and Tanzania in 1998, the U.S.S. *Cole* in a Yemeni port in 2000, and the World Trade Center and Pentagon on September 11, 2001. Al Qaeda has been characterized by one observer as a “modern army” with combat power, considerable financial resources, decentralized command and control, and operational reach into all the nations of the world.<sup>2</sup> The President has responded to Al Qaeda’s asymmetric attacks with military force, which perversely elevates the status of these terrorists from criminals to enemies.<sup>3</sup> When the Taliban government of Afghanistan persisted in providing Al Qaeda with a safe haven, it became our enemy as well.<sup>4</sup>

Military commanders need to understand how the laws of armed conflict apply when terrorists are treated as enemy combatants. Using Operation Enduring Freedom as an analytical model, this paper demonstrates the legal advantages of treating terrorists as enemies while highlighting the distinctions between lawful and unlawful combatants. Part I sets forth the legal framework for using armed force against Al Qaeda and the Taliban, and explains the advantages of treating terrorists as enemy combatants instead of criminals. Part II analyzes the Bush Administration’s decision that neither Al Qaeda nor Taliban forces are lawful combatants, focusing on the criteria for lawful combatancy and the rules regarding detention and punishment. Careful study reveals that transnational terrorists will always be unlawful enemy combatants, but the issue is fact-dependent with regard to the armed forces of states that support terrorism.

## **Part I: Jus ad Bellum<sup>5</sup> – Justifying the Use of Armed Force Against Terrorists**

### **A. The Significance of Engaging Terrorists As Enemies Instead of Criminals**

The biggest advantage in treating Al Qaeda and Taliban members as enemy combatants is the right to kill them by virtue of their collective enemy status instead of arresting them for their individual criminal acts.<sup>6</sup> If terror acts are only domestic crimes, then law enforcement agencies must investigate to determine who is individually responsible. They must capture the criminals unless it is necessary to kill in self-defense.<sup>7</sup> However, if the nature and frequency of terror acts rise to the level of an armed conflict, there is no requirement to determine individual criminal responsibility, demand surrender, or limit the use of force to self-defense.<sup>8</sup>

### **B. Authority to Use Military Force Against Terrorists**

The Posse Comitatus Act limits the military's role in supporting federal agencies responsible for enforcing our civil laws.<sup>9</sup> When terrorism rises to the level of a national security threat, the Department of Defense transitions from supporting cast member to lead actor because the President has an inherent authority to use the military to deter and prevent acts of international terrorism against the United States.<sup>10</sup> He may use military force "in the event of (1) a declaration of war, (2) specific statutory authorization, or (3) a national emergency created by attack upon the United States, its territories or possessions, or its armed forces."<sup>11</sup> However, he must consult with Congress beforehand when possible, and must keep Congress informed throughout the conflict.<sup>12</sup>

The Posse Comitatus Act does not impede military action against Al Qaeda. After the attacks of September 11, 2001, the President declared a national emergency.<sup>13</sup> Congress



promptly passed a joint resolution authorizing the use of military force against the perpetrators and all who supported them:

[T]he President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations, or persons.”<sup>14</sup>

Because Al Qaeda is a private organization, the provisions of the Charter of the United Nations (U.N.) governing the use of force against nations do not apply to the U.S.-Al Qaeda conflict.<sup>15</sup> The U.N. Charter does, however, govern the use of force against the Taliban. It restricts nations from using force against each other unless acting in self defense or under a U.N. Security Council authorizing such force.<sup>16</sup> Although the Security Council never affirmatively authorized the use of force against the Taliban, it passed resolutions recognizing the United States’ right of self-defense. The resolutions declared that all states shall “deny safe haven to those who finance, plan, support, or commit terrorist acts, or provide safe havens” and “prevent those who finance, plan, facilitate or commit terrorist acts from using their respective territories for those purposes against other States or their citizens.”<sup>17</sup> As a result, the U.S. was legally justified in pursuing Al Qaeda with armed force and engaging the Taliban forces protecting those terrorists.

## **Part II: *Jus in Bello* – Examining the Rules That Apply to Al Qaeda and Taliban Forces as Enemy Combatants**

### **A. The Privileges of Lawful Combatancy**

Although U.S. forces clearly had authority to kill Taliban and Al Qaeda members, issues of detention and sanction are more complex. At the root of each issue is the distinction

between lawful and unlawful combatants. When a nation's warriors meet the standards for lawful combatancy, they are entitled to specific privileges under the law of armed conflict. In international conflicts, such forces are immune from criminal liability when they attack proper military targets.<sup>18</sup> They are also entitled to the protections of the 1949 Geneva Convention on Treatment of Prisoners of War (POWs) [hereinafter "Geneva POW convention"] upon capture. These protections include special privileges while detained, repatriation at the end of hostilities, and specific due process rights if charged with a crime.<sup>19</sup>

### **B. The U.S. View: Al Qaeda and Taliban Are Unlawful Combatants**

In February 2002, the Bush Administration announced that neither Al Qaeda nor the Taliban forces qualified for POW protection, but emphasized that all captured Taliban and Al Qaeda personnel would be treated humanely in accordance with the general principles of the Convention and that delegates of the International Committee of the Red Cross would be allowed to privately visit any detainee.<sup>20</sup> The following sections examine the rationale offered in support of the policy. Although some of it is particularly vulnerable to criticism, good legal and practical reasons exist to deny lawful combatant status to both Al Qaeda and Taliban forces.

### **C. Al Qaeda Members Are Always Unlawful Combatants**

The U.S. position on the status of Al Qaeda members is sound. The Geneva Conventions are contracts between sovereign nations, triggered by international armed conflict.<sup>21</sup> Since the Al Qaeda terror network is not a state, it cannot be a party to the POW convention.<sup>22</sup> The ability to make treaties with other nations is a benefit of statehood.<sup>23</sup> States can enforce their treaties through direct actions such as sanctions, but also through an infinite variety of more subtle and indirect diplomatic pressures; for example, voting against a country's bid to host

an Olympics. There is no comparable inventory of carrots and sticks available to regulate the conduct of a stateless terror organization.

Only a fraction of the law of armed conflict protects Al Qaeda forces. Additional Protocols I and II to the Geneva Conventions guarantee of humane treatment for all persons who are “in the power of a Party to the conflict” or have “ceased to take part in hostilities” for any reason.<sup>24</sup> Although the U.S. has not ratified either treaty, it considers these provisions to be customary international law.<sup>25</sup> The U.S. has afforded Al Qaeda members the fundamental humane treatment prescribed by the Protocols, but international law contains no higher obligation to them.<sup>26</sup> When terrorists decide to attack a sovereign nation, they are almost entirely at the mercy of the sovereign. Affording them any greater legal combatant status would only serve to legitimize terrorism.

#### **D. Taliban Forces Are Unlawful Combatants Because of Their Conduct**

##### **1. The Geneva Conventions Apply to the Taliban**

The U.S. position with regard to the Taliban, although ultimately defensible, requires closer examination. Taliban forces are the armed forces of a party to an international armed conflict, and the Administration has acknowledged that the Geneva Convention on the treatment of POWs applies to the hostilities between the U.S. and the Taliban.<sup>27</sup> Article 2, common to all four Geneva Conventions, states that each Convention will apply in full “to all cases of declared war or other armed conflict which may arise” between states.<sup>28</sup> Although Al Qaeda are unlawful combatants due to their status as a stateless force, the Taliban are unlawful combatants due to how they conduct themselves as the armed forces of a state.

The fact that the U.S. did not recognize the Taliban as the government of Afghanistan is irrelevant.<sup>29</sup> International law establishes four criteria for an entity to be regarded as a state:

defined territory, a permanent population, control by its own internal government, and the capacity to conduct international relations.<sup>30</sup> The Taliban controlled ninety percent of the territory of Afghanistan and governed the population.<sup>31</sup> It had the capacity to conduct international relations and in fact had diplomatic relations with Pakistan, Saudi Arabia, and United Arab Emirates until September 2001.<sup>32</sup> Afghanistan may have been a pariah state, but it did not cease to be a state simply because most of the world condemned the Taliban's methods of government.<sup>33</sup>

What if Al Qaeda had been so intermingled with the Taliban government and armed forces so that the two groups were indistinguishable? Some have argued that such an incestuous relationship did exist, and it made Afghanistan an outlaw state that could not claim to be a party to the Geneva POW convention.<sup>34</sup> This argument is somewhat attractive, but it confuses the concept of a rogue state with a failed state. As the district court reviewing the case of "American Taliban" soldier John Walker Lindh noted, "the government has not argued ... that the Taliban's role in providing a home, a headquarters, and support to Al Qaeda and its international terrorist activities serve to transform the Taliban from a legitimate state government into a terrorist institution whose soldiers are not entitled to lawful combatant immunity status."<sup>35</sup>

A better "Afghanistan-as-failed-state" argument should insist the Taliban actually failed to govern, emphasizing its miserable record with regard to education, healthcare, food distribution, transportation, electricity, water, and refugee flight. Ultimately, though, the most realistic conclusion is the one adopted by the Administration. When a group succeeds in taking over a state and governing its population—however dubiously—it wins the benefits

of statehood. The Taliban did not forfeit its status as a state government simply because it provided hospitality to Al Qaeda or governed a primitive land.

The Geneva conventions apply to states even if they sponsor terrorist acts. The next step is to determine whether Taliban forces met the legal standards required to reap the benefits of their treaties.

## **2. The Taliban Failed to Qualify As Lawful Combatants Eligible for POW Protections**

On February 20, 2002, the U.S. Ambassador-at-Large for War Crimes Issues, Pierre-Richard Prosper, opined that Taliban forces were not entitled to POW status upon capture:

[A] careful analysis through the lens of the Geneva Convention leads us to the conclusion that the Taliban detainees do not meet the legal criteria under Article 4 of the convention which would have entitled them to POW status. They are not under a responsible command. They do not conduct their operations in accordance with the laws and customs of war. They do not have a fixed distinctive sign recognizable from a distance. And they do not carry their arms openly. Their conduct and history of attacking civilian populations, disregarding human life and conventional norms, and promoting barbaric philosophies represents firm proof of their denied status.<sup>36</sup>

Unfortunately, the Ambassador did not support his conclusions with any examples. What about the Taliban command structure rendered it irresponsible? Responsible command means that a unit has an identified leader who controls his subordinates and is liable for any unlawful acts he directed or allowed to happen.<sup>37</sup> Taliban forces certainly must have demonstrated some kind of responsible command structure when it defeated its competitors for control of Afghanistan after the withdrawal of the Soviet Union in the early 1990s.<sup>38</sup>

Moreover, it is difficult to see the logic in the charge that Taliban forces, as a matter of organizational practice, failed to carry their weapons openly. The problem with distinguishing soldiers from civilians in Afghanistan was that practically every man of

suitable age carried a weapon openly.<sup>39</sup> Finally, the Ambassador's insistence that the Taliban government's history of human rights abuses disqualifies its army as a lawful belligerent is not persuasive. The abominable practices of the Taliban forces must be related to the international armed conflict with the United States.<sup>40</sup>

Fortunately for the Administration, White House Press Secretary Ari Fleischer had provided a more focused rationale just two weeks earlier:

Under Article 4 of the Geneva Convention . . . Taliban detainees are not entitled to POW status. To qualify as POWs under Article 4, Al Qaeda and Taliban detainees would have to have satisfied four conditions: They would have to be part of a military hierarchy; they would have to have worn uniforms or other distinctive signs visible at a distance; they would have to have carried arms openly; and they would have to have conducted their military operations in accordance with the laws and customs of war.

The Taliban have not effectively distinguished themselves from the civilian population of Afghanistan. Moreover, they have not conducted their operations in accordance with the laws and customs of war. Instead, they have knowingly adopted and provided support to the unlawful terrorist objectives of the Al Qaeda.<sup>41</sup>

Mr. Fleischer's argument about the Taliban failing to distinguish itself from the civilian population is legally and logically sound. However, his next statement—that the Taliban does not operate in accordance with the laws of war because it “adopts and supports” Al Qaeda objectives translates into failure—stands on shaky legs.

#### **a. Wearing emblems and carrying arms**

The four conditions for lawful combatancy cited by the White House actually apply to the Taliban as “the armed forces of a Party to the conflict”<sup>42</sup> by way of the Hague Convention of 1907.<sup>43</sup> The Geneva POW convention does not reiterate these criteria defining a nation's armed forces, but unlawful combatants could never establish legitimacy by merely claiming

to be “regular” armed forces without meeting the underlying Hague standards.<sup>44</sup> To the extent it can be proven that the Taliban army does not wear uniforms that distinguish its members from a civilian population bearing abundant arms, it would fail to meet the Hague criteria as a lawful belligerent force and forfeits the protections of the Geneva POW convention. Military leaders are particularly well-qualified to gather such facts.

Additional Protocol I to the Geneva Conventions presents a legitimate counterargument. In 1977, Protocol I relaxed the requirement for uniforms or other fixed insignia so that a combatant must merely carry his arms openly during each military engagement and in the time prior to the engagement while visible to the adversary.<sup>45</sup> Under Protocol I, Taliban forces could still qualify as lawful combatants without wearing uniforms.

Although many nations are bound by Protocol I, the U.S. objects to the above provision, has refused to ratify the treaty, and does not consider it a part of customary international law.<sup>46</sup> The U.S. expects the armed forces of its nation-foes to wear uniforms and carry their arms openly in order to qualify for POW treatment.

This position makes sense. The rationale for relaxing the uniform and weapons requirement is that “there are situations in armed conflicts where, owing to the nature of the hostilities an armed combatant *cannot* so distinguish himself.”<sup>47</sup> (emphasis added) This relaxed rule is better applied to—and was obviously written to accommodate—the belligerent activities of insurgents “fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination[.]”<sup>48</sup> However, the fight with the Taliban is an international armed conflict, and it is reasonable for states to issue uniforms so that their armed combatants can distinguish themselves. If a nation’s

unconventional forces choose to shed their uniforms, they run the risk of losing their POW status if captured.

A nation must be expected to put uniforms on its troops in order to reap the benefits of lawful combatancy. The U.S. refused to ratify Protocol I largely because it is unwilling to elevate the belligerent activities of insurgents to the level of an international armed conflict.<sup>49</sup>

**b. Failure to conduct operations in accordance with the laws and customs of war**

The correct focus here should be upon the practices of the armed force as a whole rather than the acts of individual soldiers. If an individual commits an illegal act while a member of a force abiding by the laws of war, then he is entitled to POW status and due process of law in accordance with the POW convention. In order for a military organization to lose its status, it stands to reason that the whole unit must operate outside the bounds of the law in the course of the relevant conflict.<sup>50</sup>

Adopting or supporting Al Qaeda objectives may make the Taliban a state sponsor of the terrorists, but that is a reason to go to war, not a reason to disqualify the combatants in the course of a war.<sup>51</sup> The Taliban military must do something collectively unlawful in the course of the armed conflict in order for the U.S. to claim that it has lost its combatant privileges as a fighting force. It is possible for the Taliban to protect, train, supply, and agree with Al Qaeda's principles without violating the laws of war in its own military operations against U.S. forces. Their status will be dictated by their deeds.

**c. A cautionary note...**

A close look at the elements of lawful combatancy reveals how important the facts are to determining the status of an enemy nation's forces. One would argue that the only thing disqualifying the Taliban forces from POW status was their failure to wear something



distinguishing themselves from enemies and civilians alike. This is an issue of fact and highly susceptible to change. If any Taliban units wore uniforms and fought in accordance with the laws of war, then it would be hard to deny those troops the privileges of lawful combatancy.

Likewise, consider if an Al Qaeda member had fought as part of the Taliban, wore a uniform, carried a weapon, drew a Taliban salary, and was subordinate to a Taliban chain of command. Arguably, he would have a claim for POW status if captured in the fighting in Afghanistan. He would have to be repatriated at the end of hostilities unless tried for a law of war violation in the course of the Taliban-U.S. conflict, and in that case he would get a full trial under the Uniform Code of Military Justice.<sup>52</sup> Only if he were discovered responsible for an Al Qaeda attack beyond the battlefield in Afghanistan would he revert to an unlawful combatant status. This scenario illustrates how combatant status is ultimately fact-driven.

## **E. Rules Governing Detention**

### **1. Conditions of internment**

The Geneva POW convention includes specific privileges regarding safety, quarters, food, clothing, and medical care; opportunities for religious, intellectual, and physical activity; performance of labor; financial allowances; and sending and receiving correspondence.<sup>53</sup> Unlawful combatants have no such entitlements, but they must still be treated humanely as a matter of human rights law. The Administration's policy promises humane treatment to all detainees regardless of legal status.<sup>54</sup>

### **2. Repatriation**

Detainees must be sent home eventually. Prisoners of war are guaranteed to be released or repatriated "without delay at the cessation of active hostilities" unless charged with a

crime.<sup>55</sup> Unlawful combatants have no such right to prompt repatriation, and may be detained by the capturing state up until such time that detention without trial would be so arbitrary or cruel as to violate customary international law.<sup>56</sup>

### **3. The President's Military Order – Authority to Detain “Certain Non-Citizens”**

The President has ordered the Defense Department to detain certain non-citizens whom he specifically determines in writing to be either 1) Al Qaeda members, 2) other persons who have engaged in acts of international terrorism, or 3) persons those who harbor such terrorists.<sup>57</sup>

The order is legally valid as long as the designated individuals otherwise fail the established test for lawful combatancy. This is not a problem with regard to transnational terrorists in the first two categories because stateless criminals, once identified, will never get POW protection. The difficulty will arise in the third category if the harboring individuals are the armed forces of a state. Although the Taliban failed to distinguish themselves from the civilian population, it is possible for a state's armed forces to harbor a terrorist group and still retain their status as lawful combatants. Assume, for instance, that Pakistan opposed a U.S. operation that crossed its border to pursue Osama bin Laden. If they wore uniforms, were led by responsible commanders, and operated in accordance with the laws of war, the Pakistanis would certainly be lawful combatants entitled to POW status. We could not enforce the President's Military Order because it is more restrictive than the POW convention.

The second issue is more practical than legal: the Military Order contains no limitations on the length of detention without charges.<sup>58</sup> There must be a limit to the amount of time a detaining power can hold anyone without charges because when detention without trial

becomes arbitrary and cruel, customary international law and human rights law favors release.<sup>59</sup> This does not mean that lengthy detentions are necessarily arbitrary; a state has a very high level of interest in protecting its citizens, property, and national security from suspected terrorists. However, at some point in the process, the balance between human rights and state security inevitably shifts.

Although the President has wide latitude to detain unlawful combatants, his authority is not boundless. The U.S. Constitution obligates the Supreme Court to review the limits of the President's authority to detain suspected non-citizen terrorists without due process.<sup>60</sup> The Supreme Court is currently considering such a challenge by non-citizen detainees held at Guantanamo Bay, Cuba, and will likely subject the President's detention authority to close Constitutional scrutiny.<sup>61</sup> From both a legal and policy standpoint, this review should be welcomed. Our nation must not undermine its international leadership as a guardian of human rights.

#### **4. Challenging Detention**

##### **a. In federal court**

Although several individuals detained as unlawful combatants have sought relief in U.S. district courts to secure their release, only two circumstances seem to confer jurisdiction: U.S. citizenship, or presence within U.S. territorial jurisdiction. Detained citizens may seek a writ of *habeas corpus* even if they are unlawful enemy combatants.<sup>62</sup> Non-citizen detainees can only gain access to federal courts if they are physically located within U.S. territory.<sup>63</sup>

Detainees have asked federal courts to review their combatant status. John Walker Lindh asked a federal court to rule that he was entitled to combatant immunity.<sup>64</sup> Yaser Hamdi, a

Taliban soldier born in Louisiana, also sought judicial review of his combatant status and argued for his release on the grounds that active hostilities in Afghanistan were over.<sup>65</sup>

The courts in the *Lindh* and *Hamdi* cases both indicated that they had jurisdiction to review combatant status and consider the question of when active hostilities end, but each afforded a high degree of deference to the Executive Branch's decisions in these matters of war.<sup>66</sup> These cases are exceptional because they involve (hopefully) rare instances in which U.S. citizens are fighting for the enemy without forfeiting their citizenship rights. The U.S. has a strong interest in fighting its enemies on battlefields rather than in courtrooms. There is nothing blasphemous about denying enemy combatants access to federal courts; indeed, the Supreme Court ruled in the 1950 case *Johnson v. Eisentrager* that enemy aliens who have not entered the U.S. are not entitled to such access.<sup>67</sup>

#### **b. Geneva POW Convention -- Article 5 Tribunals**

Article 5 of the Geneva POW convention provides that if doubt should arise as to whether a detainee belongs to a category of forces entitled to POW status, "such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal."<sup>68</sup> Nowhere, however, does the Geneva POW convention provide any further guidance for convening such a tribunal.<sup>69</sup> Certainly nothing therein expressly requires the involvement of the federal judiciary. The plain language of Article 5 focuses on identifying the status of an individual and placing him in the appropriate category of forces.<sup>70</sup> This suggests that an Article 5 tribunal should inquire into an individual's identity and unit membership, not the lawful status of military organizations.<sup>71</sup>

By treating both Al Qaeda and Taliban detainees as unlawful combatants, the President's Military Order sidesteps an otherwise sticky wicket: if the Taliban were an Article 4 armed

force whose members were entitled to POW status, it would be in the best interest of all detainees to seek Article 5 hearings to prove they are Taliban soldiers. But because the President decided that Taliban membership does not trigger POW privileges, Article 5 apparently will not come into play as long as the President is sure the detainee is a Taliban or Al Qaeda member subject to his Military Order.<sup>72</sup>

#### **F. Lawful Combatants Receive Greater Due Process if Charged With a Crime**

Lawful combatancy is the threshold issue for determining how to punish a detainee for his unlawful acts. The POW convention guarantees lawful combatants a trial under the same laws that would apply to the detaining power's own troops under similar circumstances.<sup>73</sup> In the 1942 case *Ex Parte Quirin*, the U.S. Supreme Court ruled that unlawful combatants may be tried before military commissions instead of civilian courts:

The law of war draws a distinction between ... those who are lawful and unlawful combatants. Lawful combatants are subject to capture and detention as prisoners of war by opposing military forces. Unlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful.<sup>74</sup>

The U.S. Supreme Court will have an opportunity to review its ruling in *Quirin* later this year in *Al Odah v. United States*, in which foreign detainees at Guantanamo Bay are challenging the lawfulness of military commissions.<sup>75</sup> In order for the plaintiffs to prevail, the Supreme Court would have to overrule or distinguish its own precedents in *Quirin* and *Eisentrager* on military commissions and enemy alien access to our courts. Otherwise, it would seem that all Al Qaeda and Taliban members detained pursuant to the Military Order will be subject to trial before military commissions for their unlawful acts.

This step-by-step analysis proves that the President has considerable power when he treats terrorists as enemies. By statute, he may declare an emergency and use armed force against terrorists.<sup>76</sup> He may unilaterally decide if enemy forces are lawful or unlawful combatants, and in the limited cases where courts have jurisdiction to hear a case, they have deferred to his judgment as Commander-in-Chief.<sup>77</sup> With regard to enemy aliens, his decisions are not subject to any judicial review.<sup>78</sup> By making his own written determination that an individual is subject to his Military Order, the President has found a way to avoid Article 5 tribunals.<sup>79</sup> Finally, the President has the power to detain unlawful combatants indefinitely before bringing them before a military tribunal to face criminal sanctions, including death.<sup>80</sup> It will be interesting to find out if the Supreme Court agrees that such consolidated power is consistent with the Constitution.

## **CONCLUSION**

Historically, terrorists have been regarded as bandits and held responsible for their unlawful acts under the domestic laws of the state that captures them. In recent years this has changed. When terrorist violence rose to the level of an armed attack against the U.S., our national leadership viewed the perpetrators as enemy combatants. Commanders need to understand how the law of armed conflict applies to the various enemy forces they are likely to encounter while combating terrorism.

The U.S. decision to engage transnational terrorists as unlawful enemy combatants rather than criminals means we will apply the international law of armed conflict, which has fewer restrictions on the use of force, length of detentions, and forums for punishment. It is still possible, however, that the armed forces of a state that harbors or otherwise supports such terrorists may still remain lawful combatants protected by the Geneva Conventions. This

issue will likely be decided based upon the actual conduct of such forces, and commanders will often be in the best position to report the facts.

## NOTES

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<sup>1</sup> The Department of Defense uses the terms "international" or "transnational" terrorism interchangeably as:

Terrorism in which planning and execution of the terrorist act transcends national boundaries. In defining international terrorism, the purpose of the act, the nationalities of the victims, or the resolution of the incident are considered. These acts are usually planned to attract widespread publicity and are designed to focus attention on the existence, cause, or demands of the terrorists."

Department of Defense Directive 2000.12, DoD Combating Terrorism Program (15 Sep 1996), Encl. 2.

<sup>2</sup> Bruce Berkowitz, The New Face Of War: How War Will Be Fought In The 21<sup>st</sup> Century (The Free Press, 2003; reprint, Newport, RI: U.S. Naval War College, 2003), 10, 18.

<sup>3</sup> President, Military Order, "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism," Federal Register 66, No. 222 (16 November 2001), 57833-57834 [hereinafter "Military Order"].

<sup>4</sup> Ibid.

<sup>5</sup> Adam Roberts, "Counter-Terrorism, Armed Force, and the Laws of War," Survival, vol. 44, no. 1 (Spring 2002): 9.

<sup>6</sup> Noah Feldman, Choices of Law, Choices of War," Harvard Journal of Law and Public Policy, vol. 25 (Spring 2002): 468.

<sup>7</sup> Ibid.

<sup>8</sup> Ibid.

<sup>9</sup> Crimes and Criminal Procedure, U.S. Code, Title 18, sec. 1385 (2002).

<sup>10</sup> Department of Defense, Military Assistance For Civil Disturbances, Department of Defense Directive 3025.12 (Washington, D.C. 1994), 3.

<sup>11</sup> War and National Defense, U.S. Code, Title 50, sec. 1541(c) (2002). Statutory authorizations include 42 U.S.C. § 5191(b) (declaring an emergency other than a federal disaster); 42 U.S.C § 5170(c) (emergency 10-day authority to use Dep't of Defense for work "essential for the preservation of life and property"); 42 U.S.C. § 5170 (declaration of a



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major disaster); 42 U.S.C. § 5191(a) (declaration of an emergency); 10 U.S.C. §§ 331-334 (civil disturbance statutes); 18 U.S.C. §§ 351, 1116, 1751 (assisting Dep't of Justice in cases of offenses against the President, the Vice President, Members of Congress, the Cabinet, a Supreme Court Justice, or an "internationally-protected person"); 18 U.S.C. § 831 (prohibited transactions involving nuclear materials); 18 U.S.C. § 382 (emergencies involving chemical or biological WMD).

<sup>12</sup> Ibid., sec. 1542.

<sup>13</sup> President, Proclamation, "Declaration of National Emergency by Reason Of Certain Terrorist Attacks," Federal Register 66, no. 181 (18 September 2001), 48199.

<sup>14</sup> Joint Resolution to Authorize the Use of United States Armed Forces Against Those Responsible for the Recent Attacks Against the United States, Statutes at Large 115, sec. 2, 224 (2001).

<sup>15</sup> Charter of the United Nations, 2d ed. (Hague, 1947), Ch. I, Art. 2(1).

<sup>16</sup> Ibid., Ch I, Art. 2(4); Ch. VII, Arts. 39, 41, 42, 51.

<sup>17</sup> S.C. Res. 1368, U.N. SCOR, 56<sup>th</sup> Sess., 4370<sup>th</sup> mtg. at 1, U.N. Doc. S/Res/1368 (2001); S.C. Res. 1373, U.N. SCOR, 56<sup>th</sup> Sess., 4385<sup>th</sup> mtg. at 1-4, U.N. Doc. S/Res/1373 (2001).

<sup>18</sup> Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135, arts. 87, 99 (read together, these articles establish that a belligerent in a war cannot prosecute enemy soldiers for their lawful acts of war); reprint, Department of the Army Pamphlet 27-1, Treaties Governing Land Warfare, Department of the Army, December 1956.

<sup>19</sup> Ibid., Art. 21-32 (safety, quarters, food, clothing, medical care); Art. 34-38 (religious, intellectual, physical pursuits); Art. 49-57 (labor); Art. 60 (payment); Art. 69-77 (correspondence).

<sup>20</sup> "Statement by White House Press Secretary Ari Fleischer," United States Mission-Geneva, Press Releases 2002, 7 February 2002. <<http://www.us-mission.ch/press2002/0802fleischerdetainees.htm>> [7 Feb 2004].

<sup>21</sup> Third Geneva Convention, art. 2.

<sup>22</sup> Ibid.

<sup>23</sup> George H. Aldrich, "The Taliban, Al Qaeda, and the Determination of Illegal Combatants," 96 Am. J. Int'l L. 891, 892 (2002).

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<sup>24</sup> Protocols to the Geneva Conventions of 12 August 1949, Protocol I, art. 75; Protocol II, art. 4, Dep't of the Army Pamphlet 27-1-1 (September 1979).

<sup>25</sup> Aldrich, 893, n. 11.

<sup>26</sup> "Statement by White House Press Secretary Ari Fleischer."

<sup>27</sup> Ibid.

<sup>28</sup> Third Geneva Convention, art. 2.

<sup>29</sup> Lawrence Azubuike, "Status of Taliban and Al Qaeda Soldiers: Another Viewpoint, Connecticut Journal of International Law," 19 Conn. J. Int'l L. 127, 130-31 (Fall 2003). The Taliban is reported to be an organization influenced by the teachings of religious schools in Pakistan who were provided military training from the Pakistani government. When the Soviet Union withdrew from Afghanistan in 1989, the Taliban emerged from the six-year struggle for control of Afghanistan controlling all but a small percentage of the territory. The Taliban therefore became the *de facto* government of Afghanistan.

<sup>30</sup> Restatement of Foreign Relations Law 3d, Sec. 201 (1986)

<sup>31</sup> Azubuike, 131.

<sup>32</sup> "Saudis Break Diplomatic Ties With Taliban," CNN.com./World, 25 September 2001, <<http://www.cnn.com/2001/WORLD/asiapcf/central/09/25/ret.saudi.taliban/>> [31 January 2004].

<sup>33</sup> Azubuike, 131-34.

<sup>34</sup> Mackubin T. Owens, "Detainees or Prisoners of War?," Ashbrook Center for Public Affairs at Ashland University, January 2002, <<http://www.ashbrook.org/publicat/oped/owens/02/pow.html>> [2 February 2004].

<sup>35</sup> United States v. Lindh, 212 F. Supp. 2d 541, 553 n.16 (E.D. Va. 2002).

<sup>36</sup> Pierre-Richard Prosper, Ambassador-at-Large for War Crimes Issues, "Status and Treatment of Taliban and Al Qaeda Detainees," Remarks at Chatham House, London, United Kingdom, 20 February 2002, <<http://www.state.gov/s/wci/rm/2002/8491pf.htm>> [7 February 2004].

<sup>37</sup> William H. Parks, "Command Responsibility for War Crimes," 62 Mil. L. Rev. 1 (1973).

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<sup>38</sup> Michael Rubin, “Who Is Responsible for the Taliban?” Middle East Review of International Affairs, March 2002, <<http://www.washingtoninstitute.org/media/rubin/rubin-who.htm>> [7 February 2004].

<sup>39</sup> David Buchbinder, “Guns Offer Fast Profits for Afghans,” Christian Science Monitor, Aug. 6, 2002, <<http://www.csmonitor.com/2002/0806/p07s01-wosc.html>> [7 February 2004].

<sup>40</sup> Aldrich, 895-96.

<sup>41</sup> “Statement by White House Press Secretary Ari Fleischer.”

<sup>42</sup> Third Geneva Convention, art. 4(A)(1).

<sup>43</sup> Hague Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, T.S. No. 539, *reprinted in* Dept’ of the Army Pamphlet 27-1, Treaties Governing Land Warfare, at 8; Manual of Military Law 240 (British War Office, 1914) (“It is taken for granted that all members of the army as a matter of course will comply with the four conditions; should they, however, fail in this respect... they are liable to lose their special privileges of armed forces.”).

<sup>44</sup> Lindh, 212 F. Supp. 2d at 557, n.35.

<sup>45</sup> Protocol I, art. 44.

<sup>46</sup> Kenneth Anderson, “What to do With Bin Laden and Al Qaeda Terrorists? A Qualified Defense of Military Commissions and United States Policy on Detainees at Guantanamo Bay Naval Base,” 25 Harv. J.L. & Pub. Pol’y. 591, 615 (2002).

<sup>47</sup> Protocol I, art. 44(3).

<sup>48</sup> Protocol I, art. 1(4).

<sup>49</sup> Michael J. Matheson, “The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions,” 2 Am. U.J. Int’l & Pol’y 419, 420 (1987).

<sup>50</sup> Aldrich, 895.

<sup>51</sup> *Ibid.*

<sup>52</sup> Third Geneva Convention, art. 87, 99-108.

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<sup>53</sup> Third Geneva Convention, art. 21-32 (safety, quarters, food, clothing, medical care); art. 34-38 (religious, intellectual, physical pursuits); art. 49-57 (labor); art. 60 (payment); art. 69-77 (correspondence).

<sup>54</sup> “Statement by White House Press Secretary Ari Fleischer.”

<sup>55</sup> Third Geneva Convention, art 118.

<sup>56</sup> Protocol I, art 75; Protocol II, art. 4.

<sup>57</sup> Military Order, sec. 2(a)(1)(i)-(iii) (defining individuals subject to detention); sec. 3 (ordering detention).

<sup>58</sup> Military Order, *passim*.

<sup>59</sup> Protocol I, art 75; Protocol II, art. 4.

<sup>60</sup> Jordan J. Paust, “Judicial Power To Determine the Status and Rights of Persons Detained Without Trial,” 44 Harv. Int’l L.J. 503, 504 (Summer, 2003) (arguing that international law, the U.S. Constitution, and U.S. federal case law limit the power to detain persons without trial, and that such detention must be subject to judicial review).

<sup>61</sup> Brief of the Military Defense Attorneys Assigned to the Defense in the Office of Military Commission as Amicus Curiae in Support of Neither Party, *Al Odah v. United States*, No. 03-343 (14 January 2004) (on file with author).

<sup>62</sup> William H. Rehnquist, All the Laws But One – Civil Liberties in Wartime (New York: Vintage Books 1998), 128; *Hamdi v. Rumsfeld*, 316 F.3d 450 (4<sup>th</sup> Cir. 2003).

<sup>63</sup> *Ex Parte Quirin*, 317 U.S. 1 (1942); *Johnson v. Eisentrager*, 339 U.S. 763 (1950).

<sup>64</sup> *Lindh*, 212 F. Supp. 2d 541.

<sup>65</sup> *Hamdi*, 316 F.3d at 461.

<sup>66</sup> *Lindh*, 212 F. Supp. 2d at 557; *Hamdi*, 316 F.3d at 462-63.

<sup>67</sup> *Eisentrager*, 339 U.S. at 781 (1950).

<sup>68</sup> Third Geneva Convention, art 5.

<sup>69</sup> *Ibid*.

<sup>70</sup> *Ibid*.

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<sup>71</sup> Ibid.

<sup>72</sup> Military Order, sec.2.

<sup>73</sup> Third Geneva Convention, art. 102.

<sup>74</sup> Ex Parte Quirin, 317 U.S. at 30-31.

<sup>75</sup> Al Odah, 124 S. Ct. 534 (2003).

<sup>76</sup> War and National Defense, U.S. Code, Title 50, sec. 1631 (2002).

<sup>77</sup> Military Order, sec. 2; e.g., Hamdi, 316 F.3d at 462-63.

<sup>78</sup> Eisentrager, 339 U.S. at 781 (1950).

<sup>79</sup> Military Order, sec. 2.

<sup>80</sup> Ex Parte Quirin, 317 U.S. 1; Military Order, sec. 4

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